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system of general commercial law in the United States, announced in *Watson v. Torpley*, and recognised in general phrase by some other decisions of the Federal courts, as existing independent of the laws of the respective states, is utterly illusive: that the courts of the United States know and administer that system of commercial law which they find to obtain under the laws of the state, and these conclusions flow naturally from the just, long-established and adequate rule of the *lex loci*, in which, as a general principle, there seems to be a universal consent of all common-law courts and jurists; to it indeed may well be applied the maxim of Cicero, "*Non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore una eademque lex obtinebit.*"

ROBERT G. STREET.

Galveston, Texas.

RECENT AMERICAN DECISIONS.

Supreme Judicial Court of Maine.

ALLEN ET AL. v. INHABITANTS OF JAY.

The legislature of the state has no power to pass a law authorizing a town to raise money either by taxation or issuing its bonds, and loan the same to private parties, to enable them to erect mills and manufactories in such town, thereby to increase its wealth and business, as well as the accommodation of its inhabitants. Such an object is entirely a private one, and in no sense entitled to be called a public use of such a character as to justify the imposition of taxes upon the inhabitants and property of a town by the vote of the majority of such town.

The minority of the inhabitants in such case may lawfully demand for their protection, the interposition of this court by way of injunction.

A TOWN-MEETING of the inhabitants of Jay was duly called to see if the town would loan its credit to Hutchins & Lane, on certain terms, provided "said Hutchins & Lane shall move their new saw-mill and box factory from Livermore Falls to Jay Bridge, and also put in operation one run of stones for grinding meal, and establish their manufacturing business as soon as the month of September A. D. 1870, at or near Jay Bridge."

At a legal meeting held upon this call on April 19th and by adjournment on April 21st 1870, the town "voted to loan their credit to the amount of ten thousand dollars, at six per cent. annually to H. W. Hutchins and B. R. Lane, provided said Hutchins & Lane will invest the amount of from twelve to thirteen thousand dollars in building a steam saw-mill, box factory machinery and land, also to put in one run of stones for grinding meal,

to be located at or near Jay Bridge, and to keep the above-named property in good repair, and also keep it amply insured, and to cause said manufacturing business to be carried on for a term not less than ten years, said Hutchins & Lane to pay all the interest, and ten per cent. of the principal annually after three years," the town to be secured by a mortgage of the mill, machinery and land "at the rate of one dollar for every seventy-five cents thus loaned by said town, and the selectmen are hereby authorized to issue town bonds for the above amount, payable in yearly instalments after three years at six per cent. interest annually, viz.: one thousand dollars the first year, and nine hundred dollars each year for the ten succeeding years, providing the whole amount shall be necessary to establish said manufacturing business."

The legislature passed an act, chapter 716, approved February 25th 1871, in the following terms:

"Whereas upon due investigation and consideration we deem it for the benefit of the town of Jay, and of the people of this state, said town is hereby authorized to loan the sum of ten thousand dollars to Hutchins & Lane, in accordance with a vote taken by said town on the 21st day of April, eighteen hundred and seventy, for the encouragement of manufacturing in said town."

The complainants, ten taxable inhabitants of Jay, under R. S. C. 77, § 5, by which this court has equity jurisdiction, "when counties, cities, towns or school districts, for a purpose not authorized by law, vote to pledge their credit or to raise money by taxation, or to pay money from their treasury," have filed a bill in equity, praying that the defendants and all their officers may be enjoined from issuing certain bonds, duly described in the bill, the issue thereof being for a purpose not authorized by law.

The opinion of the court was delivered by

APPLETON, C. J.—The purpose of the Act is obvious, and the inquiry is whether the purpose is one authorized by law?

Whether the loan be of town bonds or of money, as, if the loan be of bonds, the town must ultimately be liable for their payment, and as the payment is to be raised by taxation, matters not. The question proposed is whether the legislature can authorize towns to raise money by taxation for the purpose of loaning the money so raised to such borrowers as may promise to engage in manufacturing or any other business the town may prefer, for their private gain and emolument. Is the raising of money to loan to such persons as the town may determine, as borrowers, a legal exercise of the power of taxation? Ultimately it will be found that the question resolves itself into an inquiry, whether the legislature can constitutionally authorize the majority of a town to loan their own and the money of a minority raised by taxation and against the will of such minority, as such majority may determine.

A tax is a sum of money assessed under the authority of the

state, on the personal property of an individual for the use of the state. Taxation, by the very meaning of the term, implies the raising of money for public uses and excludes the raising if for private objects and purposes. "I concede" says BLACK, C. J., in *Sharpless v. Mayor*, *8c.*, 21 Penn. 167, "that a law authorizing taxation for any other than public purposes is void." "A tax," remarks GREEN, C. J., in *Camden v. Allen*, 2 Dutch. 839, "is an impost levied by authority of government, upon its citizens or subjects for the support of the state."

"No authority or even *dictum* can be found," observes DILLON, C. J., in *Hanson v. Vernon*, 27 Iowa 28, "which asserts that there can be any legitimate taxation when the money to be raised does not go into the public treasury or is not destined for the use of the government or some of the governmental divisions of the state."

If there is any proposition about which there is an entire and uniform weight of judicial authority, it is that taxes are to be imposed for the use of the people of the state in the varied and manifold purposes of government and not for private objects or the special benefit of individuals. Taxation originates from and is imposed by and for the state.

In this case the vote of the town of Jay and the act of the legislature passed to enable the town to carry that vote into effect, are both before us. Taking the vote of the town in connection with the article in the warrant calling the meeting, it seems that Hutchins & Lane had a "new saw-mill and box factory at Livermore Falls," which they were then carrying on at that place, and the town of Jay proposed to loan their credit for ten thousand dollars and issue bonds of the town for that amount, if they would remove their saw-mill and box manufactory and put in one run of stones for grinding meal to be located at or near Jay Bridge. The vote contemplates a mere matter of private business, the removing of certain business from one town to another, whereby the town to which the removal is made is expected to be a gainer by encouraging manufactures therein, and the town from which the removal is made is to be a loser to precisely the same extent by their removal therefrom.

Capital naturally seeks the best investment, or its owners do. Those who by industry and economy have become capitalists are more likely to invest it well than those who, having gained none, have none to lose. The sagacity shown in the acquisition of capital, is best fitted to control its use and disposition.

It is obvious that if the removal from Livermore Falls would be made without special inducement, in other words, if the prospect of profit at Jay Bridge were sufficient to induce Messrs. Hutchins & Lane to move their saw mill, &c., without any special offer of the defendant town, there would be no necessity for making such offer. It is not readily perceived that raising money under such circumstances would be of public benefit. If they should not so

deem it and it is not advantageous on the whole for them to make the removal, then it is a premium offered for them to make a removal injurious to their interest, and which they would not otherwise make, and of sufficient magnitude to induce them to meet the probable loss. Still less can it be conceived to be of "benefit" in such case to raise money to promote losing enterprises.

It is said that it induces enterprises which would not otherwise be undertaken. But why not undertaken? Every man is the best judge of his interest. There may be exceptions, but such is the general rule. Now why is not capital invested at Jay Bridge? The answer is obvious. No one having capital to invest or loan is willing, for any existing prospect of gain, to invest or to loan money to be thus invested. The want of existent capital or sufficient probability of profit, are reasons why the proposed undertaking has not been carried into operation.

The idea seems to be that thereby capital would be created. But such is not the case. Capital is the saving of past earnings ready for productive employment. The bonds of a town may enable the holder to obtain money by their transfer as he might do by that of any good note. But no capital is thereby created. It is only a transfer of capital from one kind of business to another.

Nor is capital created by the raising of money by taxation. If the wealth of the country were increased by taxation, the result would be the higher the taxes the more rapid the increase of its wealth. But the reverse is the case. The wealth of the country is lessened by the time spent in assessing and collecting taxes, and by the taxes collected, if unproductively expended.

Is the removal of the new saw-mill, &c., by Messrs. Hutchins & Lane, a public or private enterprise? Hutchins & Lane are now at Livermore. They propose to remove to Jay Bridge. It is their interest alone which they will consider. But why remove? It is no more a public purpose than any other removal of manufacture from one town to another. The town of Jay is to have no share in the anticipated profits of Messrs. Hutchins & Lane. The state is not to be a partaker of their gains. The new mill, &c., being removed, the town of Jay stands in precisely the same relation to it as other towns to new or old mills within their limits, so far as regards any public benefit to be derived therefrom. The timber of the inhabitants is sawed at the usual compensation. Their grists are ground for the same customary toll as those of others.

The industry of each man and woman engaged in productive employment is of "benefit" to the town in which such industry is employed. This can be predicated of all useful labor—of all productive industry. But because all useful labor, all productive industry conduces to the public benefit, does it follow that the people are to be taxed for the benefit of one man or of one special kind of manufacturing? If so, then there is no kind of labor, no

manufacturing for which the minority of a town may not be assessed for the benefit of an individual. There is nothing of a public nature in the new saw-mill of Hutchins & Lane, any more entitling them to special aid than the owners of any other saw-mill. The sailor, the farmer, the mechanic, the lumberman are equally entitled to the aid of coerced loans to enable them to carry on their business with Messrs. Hutchins & Lane. Our government is based on equality of right. The state cannot discriminate among occupations, for a discrimination in favor of one is a discrimination adverse to all others. While the state is bound to protect all, it ceases to give that just protection when it affords undue advantages, or gives special and exclusive preferences to particular individuals and particular and special industries at the cost and charge of the rest of the community.

Unless there is something peculiar and transcendental in the new saw-mill to be removed and in the grist-mill to be erected and in the labor of Messrs. Hutchins & Lane, it must stand in the same category with other saw-mills and grist-mills, which are and have been and will be built, and other laborious industries which are pursued for private gain and emolument.

The alleged justification for raising money to be loaned to private individuals for their own profit arises from the supposed public benefit to be made of the money so loaned. But the moment the loan is effected the bonds and money raised from their sale become the bonds and money of the person borrowing, and subject to his control. The town have lost all power over the use and disposition of their loan. True, they may sue for any violation of the contract, if any is made, in reference to the manner of its employment. The loan, when once made, becomes like all other loans. The borrower has it—it is his. The loan effected there is the end of the matter.

The question recurs, can the town raise money by taxation merely to loan again to individuals for their own purposes? for it has been seen that the loan effected, the town loaning cannot control the use of the loan, and the loan is merely for the benefit of the individual borrowing. The bonds to be loaned or the money to be loaned are in the hands of the loaning committee. It is to be loaned for a longer or shorter time, upon security good, bad, indifferent; fortunate, if only the latter. Is the loaning of bonds or money by the town in any respect different from the loaning of money by individuals? Does the mere fact that the town makes the loan irrespective of any other consideration make the loan a public "benefit" more than, or different from any other loan by an individual or banking corporation having funds to loan?

That a town cannot raise money to divide again among its inhabitants was conclusively settled long ago in this state in *Hooper v. Emery*, 14 Me. 379, "to contend," observes SHEPLEY, J., "that towns have the power to assess and collect money for

the purpose of distributing it again according to numbers, is to ask for a construction not only entirely unauthorized by the language of any statute, but in direct opposition to the language of limitation employed in giving powers to towns to grant money. It not only does this, but it asks the court to give a construction to statutes, which would authorize towns, if so disposed, to violate the principles of moral justice. For if the right to assess and collect money is without limit, it would not be difficult to continue the process of collection and division until the whole property held by the citizens of the town had passed into and out of the treasury; and until an equalization of property had been effected, as nearly as it could be expected to be by placing it all in one common fund and then dividing it by numbers, *per capita*, without distinction of sex or age. Such a construction would be destructive of the security and safety of individual industry and exertion. It would authorize a violation of what is asserted in our declaration of rights, to be one of the natural rights of men, that of acquiring, possessing and protecting property. Such a construction would authorize a violation also of that clause in the constitution of this state, which provides that private property shall not be taken for public uses without just compensation, nor unless the public exigencies require it. No public exigency can require that one citizen should place his estates in the public treasury for no purpose but to be distributed again to those who have not contributed to accumulate them, and who are not dependent on public charity."

But whether the money raised is to be distributed *per capita* or loaned, can make no difference in principle. If towns can assess and collect money to be again loaned to such persons as the majority may select for such purposes as it may favor, with such security or without security as it may elect, property ceases to be protected in its acquisition or enjoyment. Whether the estates of citizens are to be placed in the public treasury for the purpose of dividing them, or of loaning them to those who have not accumulated them, matters not. In either case, the owner is despoiled of his estate and his savings are confiscated.

If the loan be made to one or more for a particular object, it is favoritism. It is a discrimination in favor of the particular individual, and a particular industry thereby aided, and is one adverse to and against all individuals, all industries not thus aided.

If it is to be loaned to all, then it is practically a division of property under the name of a loan. It is communism incipient, if not perfected.

If it were proposed to pass an act enabling the inhabitants of the several towns by vote to loan the horses or oxen or to lease the houses to some individual for his private gain, whom the majority may select, the monstrous absurdity of such legislation would be transparent. But the mode by which property would be taken from one or more and loaned to others can make no difference. It

is the taking to loan, or otherwise dispose of for private purposes, against the consent of the owner, that constitutes the wrong, no matter how taken. Whether the horse be taken from the reluctant owner to be loaned to some favored livery-stable keeper, or the loan be of money raised by the collector on its sale, or by the payment of the tax to avoid such sale, does not change the result. In either case the horse or the value thereof is loaned by others, without the owner's consent. If a part of one's estate may be taken from him and loaned to others, another and another portion may be taken and loaned until all is gone.

By the constitution of this state "certain natural inherent and unalienable rights" are guaranteed to the citizens of this state, "among which are those of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness." What motive is there for the acquisition of property, if the tenure of the acquisition is the will of others? How can our property be protected, if the legislature can enable a majority to transfer by gift or loan, to certain favored and selected individuals, through the medium of direct taxation, such portions of one's estate as they may deem expedient. Men only earn when they are protected in the acquisition, possession and enjoyment of their property. The barbarous nations of Asia have neither industry nor capital, the result of saving, for the reason that property is without protection. Where is the protection of property if one's money or his goods can be wrested from him and loaned to others? Where is the difference between the coerced contribution of the tax gatherer to be loaned to individuals for their benefit, and those of the conqueror from the inhabitants of the conquered territory? If one's money may be taken from him without and against his consent, to be loaned to an individual whom he would not trust, for a time which might be inconvenient, for a purpose which he might deem injudicious, what protection is afforded him? What would be thought of a statute requiring individuals to give their notes to others to be discounted for their special benefit, or to raise money to be thus loaned. What differs it whether individuals are compulsorily required to loan their notes on time to others, to be discounted for such others, or the bonds of the town to be loaned, which the citizens may ultimately be compelled to pay. All security of private rights, all protection of private property is at an end, when one is compelled to raise money to loan at the will of others, or to pay his contributory share of loans of money or bonds made to others for their own use and benefit, when the power is given to a majority to lend or give away the property of an unwilling minority.

Further, by the constitution, "private property shall not be taken for *public uses* without just compensation, and unless *public exigencies* require it.

The right of eminent domain is an attribute of sovereignty. It is the right to seize and appropriate specific articles of property

for public use when some public exigency requires it, and not otherwise.

But this is not the case of taking private property under the right of eminent domain, but of taking it under the power of taxation. But the power of taxation as well as the right of eminent domain has its limits, which cannot be constitutionally transcended.

In his answer to certain inquiries proposed by the legislature of this state, 58 Maine 616, Mr. Justice TAPLEY uses the following clear and expressive language: "Without entering at this time into a discussion or recapitulation of the reasons for the rule and the necessities which require it, I hold that the taking of private property, against the will of the owner, must find a justification in some *public use* and under some *public exigency*, and accompanied by a just compensation, and this is true whether the property be a direct seizure of it in specie and irrevocably committing it to a use, or taken by the indirect method of a loan, accompanied by some fancied or real security for a subsequent reimbursement."

"Some distinction has been sought to be made between the right to seize specific articles of property for public use, and obtaining money through the ordinary forms of taxation, and we sometimes have a justification under the taxing power of the government. I am not able to perceive the soundness of the distinction. I understand that the right and power of taxation rests upon the right as described by Judge STORY of the sovereign power to appropriate not only the public property, but the private property of all citizens within the territorial sovereignty to *public* purposes. The difference is in the mode of taking only."

Three elements are required to bring a case within the provision of the constitution under consideration—a public use—a public exigency and a just compensation.

Is the removal of a new saw-mill by the owners from one town to another adjacent, to be there carried on by themselves for their own profit, for the public use? Is the building of a new grist-mill, the toll to be taken by the builders, for the public use?

Is it any more for the public use than any other industry, the benefit of which incidentally results to the public, but which is carried on for private gain. If Messrs. Hutchins & Lane were to saw for the public without compensation or grind all grists brought to their mill without toll, the saw-mill and the grist-mill might be deemed public, precisely as a court-house or state-house or highway is public; but it is not pretended that such is their intention. They remove because more sawing is to be done and more tolls are to be taken. The charges are not to be lessened. The saw-mill and the grist-mill are private property, as are all other mills and farms owned by individuals, carried on for their own use and profit, and enacting that they are for a public use, without changing the rights of the public in the least degree, as to their rights to use them cannot alter the question. It is beyond the legislative

power, by force of an enactment, to make that public which is essentially private.

But a public use is not all. Is there any *public* exigency existing requiring the removal of the new saw-mill of Hutchins & Lane from Livermore Falls to Jay Bridge to be there carried on for their benefit? Does the public exigency require the building of a new saw-mill there? If there is such public use and public exigency, then anybody's land or mill site and land may be taken from him by vote of the town and leased to a lessee to be selected and voted for by the majority, and his money may be wrested from him by the tax gatherer, to pay for the mill to be erected thereon.

The remarks of Mr. Justice WOODBURY in the *West River Bridge Co. v. Dix et al.*, 6 How. 545, are very pertinent and applicable to the question under consideration. "Nor do I agree that, in all cases of public use, property which is suitable or appropriate can be condemned. * * * But the doctrine that this right of eminent domain exists for every kind of public use, or for such use when merely convenient, though not necessary, does not seem to me by any means clearly maintainable. It is too broad, too open to abuse. When the public use is one, general and pressing, like that often in war, for sites of batteries or for provisions, little doubt would exist as to the right.

"But when we go to other public uses not so urgent, not connected with precise localities, not difficult to be provided for without this right of eminent domain, and in places where it will be only convenient, but not necessary, I entertain strong doubts of its applicability. Who ever heard of laws to condemn private property for a public use, for a marine hospital or state prison?

"So a custom-house is a public use for the general government, and a court-house or jail for the state. But it would be difficult to find precedent or argument to justify taking private property, without consent, to erect them on, though appropriate for the purpose. No necessity seems to exist which is sufficient to justify so strong a measure."

But if there is no such exigency in the cases mentioned, even where the use is public, for taking private property without consent, still less can there be such exigency where the use is private. If there is no such exigency as will justify the taking of a man's land for a jail or court-house, still less is there for taking his mill site which he may wish to occupy, or his money which he may wish to use, to lease the one and loan the other, or any part thereof, to enable Messrs. Hutchins & Lane to place their new saw-mill or to erect a new grist-mill thereon, or to furnish them with funds to carry on their own business.

Neither is there found the just compensation which the constitution requires. The possible contingent and indirect benefit resulting from a manufacturing business, the prospects of which

are such that the manufacturer will not invest his own—the prospects of which are such that he either will not or cannot borrow funds for the purpose—and the only mode of obtaining them is the enforced contribution from those who have no funds to loan, or having them, have no faith in the object for which the contributory assessment and collections is made nor in the individual for whose use and profit they are collected, assuredly is not the just compensation contemplated. If the result proves fortunate, which can hardly be anticipated, the indirect benefit is no just compensation to those who have no participation in the profits. If unfortunate, it is still more difficult to perceive the “public benefit” likely to result from an unsuccessful and disastrous speculation.

That the money may possibly be repaid is not the just compensation justifying a compulsory loan. It may never be repaid, and then where is the compensation? Besides, the true question is whether a man is to lend his own money or others are to loan it for him, and if he is unwilling to advance to a tax gatherer, for others to loan, the legislature can constitutionally authorize the sale of his property, or commit him to jail for non payment?

The constitution further provides that no person shall “be deprived of his life, liberty, property or privileges but by the judgment of his peers or the law of the land.” Property taken by taxation is not taken by the judgment of one’s peers. A statute in direct violation of the essential principles of justice is not “the law of the land” within the meaning of the constitution. Every citizen holds life, liberty and property by the law and under its protection. Every enactment is not of itself and necessarily the law of the land. To declare it to be so would render this portion of the constitution nugatory and ineffectual. The phrase is adopted from Magna Charta: “As to the words from Magna Charta,” observes JOHNSON, J., in *Bank v. Oakley*, 4 Wheat. 235, * * * “after volumes spoken and written, with a view to their exposition, the good sense of mankind has at length settled down to this that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.” But can any one conceive a more arbitrary exercise of the powers of government than the arbitrary collection of money from one man to loan the same to another.

The constitutional provision that “private property shall not be taken for PUBLIC USES without just compensation; nor unless the public exigencies require it,” by necessary implication prohibits the taking of private property for private purposes by legislative action.

If the use or the exigency for which property is taken is public, the determination of the legislature that the necessity of so taking it exists, is conclusive. *Spring v. Russell*, 7 Greenl. 273.

As private property can only be taken without the consent of

the owner for public uses and upon the payment of just compensation and the existance of a public exigency requiring it to be so taken, it becomes important to consider whether the legislature are the final and conclusive judges of the existence of the public use for which private property is authorized to be taken under the constitution. "The provision in the constitution that no part of the property of an individual can be taken from him or applied to public uses without his consent or that of the legislature, and that where it is appropriated to public uses, he shall receive a just compensation therefor, necessarily implies" observes BIGELOW, C. J., in *Talbot v. Hudson*, 16 Gray 421, "that it can be taken only for such a use, and is equivalent to a declaration that it cannot be taken and appropriated to a purpose in its nature private, or for the benefit of a few individuals. In this view it is a direct and positive limitation upon the exercise of legislative power, and an act which goes beyond this limitation must be unconstitutional and void. No one can doubt that if the legislature should by statute, take the property of A. and transfer it to B., it would transcend its constitutional power. In all cases, therefore, when this power is exercised, it necessarily involves an inquiry into the rightful authority of the legislature under the organic law. But the legislature have no power to determine finally upon the extent of their authority over private rights. This is a power in its nature essentially judicial, which they are by article 30 of the Declaration of Right, expressly forbidden to exercise. The question whether a statute in a particular instance exceeds the just limits of the constitution must be determined by the judiciary. In no other way can the rights of the citizen be protected when they are invaded by legislative acts which go beyond the limitations imposed by the constitution. In *Tyler v. Beecher*, 44 Verm. 651, the principle under discussion was considered by the court and Mr. Justice WHEELER in delivering the opinion of the court uses the following language: "Wherever the use is public the legislature has full power to determine whether a necessity for taking for such use in any class of cases exists or not. *Williams v. School District*, 33 Verm. 271. And the legislature has the sole prerogative of determining as to the propriety of exercising the power it has upon the necessity that does exist in any class of cases. But the legislature has not the power to so determine that a use is a public use or to make the determination conclusive. The attempt therefore of the legislature to exercise the right of eminent domain does not settle that it has the right; but the existence of the right in the legislature in any class of cases is left to be determined under the constitution by the courts."

In delivering the opinion of the court in *Concord Railroad v. Greeley*, 17 N. H. 47, GILCHRIST, J., in referring to a provision of the constitution of New Hampshire, similar to that of this state on this subject, uses the following language: "The words are

very comprehensive. It may include a multitude of objects. Their construction is a matter of judicial decision ; because, however decided may be the opinion of the legislature that property in a given case has been taken for a public use, still, whenever the question arises whether it has been taken, within the meaning of the constitution, it becomes our duty to determine it. The opinion of the legislature is not final upon this more than upon any other point, where claims, cognisable in this court, depend upon the question whether or not an act of that body is or is not in conflict with the constitution. Thus, even if the legislature should declare that an act taking the property of A. and giving it to B. as his private property, was an application of it to public uses, no one would contend that such declaration made that public which, in its nature and object, was private." It is obvious that if the determination of the legislature that the purpose for which private property is taken is for a public use, and that the necessity for so taking it exists, it is conclusive that all property is held subject to its uncontrolled will. But such it seems is not regarded to be the law, but it is for the court to determine whether the use for which property is taken is or is not public.

But to constitute a public use, that will justify the taking of private property under the constitution, it is not essential that all portions of the community should derive equal benefit from the purpose for which the property is taken. It may be taken, though only portions of the community are thereby benefited.

The line of demarcation between the case when property is taken for public, and when taken for private purposes, may not always be easily determined. But in the case before us, the removal by the owners of their mill, and the business connected with it from one town to another, cannot, under the most liberal construction, be deemed other than a private matter. It may be a loss to one town and a gain to another, but the removal is for the private gain of the persons moving. It is in no respect other than the moving of one business man with his implements of business from one place to another.

Neither can it be deemed a public use to raise money from all the inhabitants of a town to be given, or to be loaned to one of its number, to be used by him for his individual gain.

The very object of the provision of the statute, under and by virtue of which this bill is brought, was to prevent the misappropriation of the funds of a town when collected, or to prohibit the issuing of bonds hereafter to be paid from the moneys of the same when collected.

But even if the moving of a new saw-mill from one town to another adjacent, or the building of a new grist-mill, the moving being for the benefit of the owners of the mill, and the building of the grist mill for the benefit of the builders, or the giving or loaning money to produce such results for such purpose, were by

some strange perversion of language from its ordinary acceptation to be deemed a public use, though the public have no more right to use it than they have any other property of individuals; and if by strength of imagination a public exigency could be perceived in making such change of location and such new erection, or in giving or loaning for such purposes, and a just compensation could be found when there is or may be none whatever, and it were to be deemed a just protection of property that a majority might loan the property of a minority, or encumber it with debts for private objects against the will and protestations of such minority, still the complainants are entitled to have the injunction heretofore granted made perpetual. The legislature have not said that the removal of the new saw-mill of Messrs. Hutchins & Lane, or their building a grist-mill with one run of stones is for the "public use," or is required by any public exigency. But many things may be for the "benefit" of Jay, and not for public use. Many things may be for the "benefit" of the people of the state, which are not required by any existing "public exigency." All the legislature seem to have determined is that Jay affords a better site for the saw-mill and grist-mill of Messrs. Hutchins & Lane than the one occupied by them in the town of Livermore.

The Constitution of the State is its paramount and binding law. The acquisition, possession and protection of property are among the chief ends of government. To take directly or indirectly the property of individuals to loan to others for purposes of private gain and speculation against the consent of those whose money is thus loaned, would be to withdraw it from the protection of the Constitution and submit it to the will of an irresponsible majority. It would be the robbery and spoliation of those whose estates or a portion of whose estates is thus confiscated. No surer or more effectual method could be devised to deter from accumulation—to diminish capital, to render property insecure, and thus to paralyze industry.

Injunction made perpetual.

TAPLEY, J., dissented.

The foregoing opinion and the still more recent decision of the Supreme Judicial Court of Massachusetts, in the case of *Lowell v. The City of Boston*, seem to justify the expectation, that some limits will hereafter be placed to the power of interested parties through the legislature to carry forward *private enterprises* by means of taxation. The case of Boston grew out of an act of the legislature, at a special session, called largely for that purpose, by which the city was authorized to

issue bonds, not exceeding \$20,000,000, at five per cent. interest, when payable in gold, or six per cent., if payable in currency. The avails of these bonds to be loaned to the owners of land upon which buildings were destroyed by the great fire in November last. Commissioners were appointed to manage the loan, and were required to take a first mortgage upon the land at less than three-fourths its value, as security for the money advanced, at seven per cent.

interest. Here was a case where there could be no reasonable danger of loss, and a high probability of some gain to the city by means of the larger rate of interest paid by the borrowers than that paid by the city. There could be no fair question either that such a proceeding would afford great accommodation to the property-owners on the "burnt district," and that it would greatly conduce to the speedy restoration of that portion of the city, and thus naturally tend to the increase of the wealth and business prosperity of the city, and to some extent, to the greater convenience, accommodation and prosperity of the inhabitants of the city generally. And still the court, unanimously, so far as we learn, came to the conclusion, that the statute was void, and perpetually enjoined all proceedings under it.

It cannot be denied, we think, by any one who has examined the question carefully, that there is a most alarming disposition manifested in all directions, within the last few years, to take possession of public money for private uses. We need not refer to particular instances, but everywhere, and as well among the best men we have as others, there seems to be no scruple in appropriating public money to private uses, provided only it be done for the good of large numbers. And there seems no difficulty, anywhere, in bringing the legislatures into these views. There remains therefore no security whatever against such abuse of taxation, except from the restraining power of the courts: And this is, in some sense, no doubt, in a popular government, a somewhat precarious reliance. We do not here refer so much to the elective tenure of judicial office as to the innate difficulty of bringing any class of men very much above the general public opinion by which they are surrounded. There is, with all thoughtful men, and none the less among the more highly cultured, an instinctive tendency to dis-

trust their own opinions, whenever they find them in conflict with the mass of opinion by which they are surrounded: and on the other hand to rest satisfied with any the most superficial views, when everybody almost chimes in with loud and enthusiastic acclamations, in favor of the same views. It has never seemed to us that this country had suffered so much in the want of independence in its judiciary, from any cringing or cowardly subservience to popular sentiment; on the mere ground of securing a re-election to office, by the individual judges, as in the want of capacity, among the members of the different tribunals, to readily and clearly comprehend the numerous and fatal fallacies which, many times, one might say, almost always, underlie that popular sentiment, which is rushing them on to false conclusions.

We do not seem, any of us, to always bear in mind, how the popular opinion springs up, even upon what seem to be great and important public questions. If a lawyer presents any particular view to the courts in favor of his client, we begin by distrusting his whole scheme, from beginning to end, as the mere makeshift of an interested party, and withhold our assent to every proposition he urges until compelled to accept it as sound. But it seems never to occur to us, that popular opinion, upon most of the great questions of the day, is created in the same manner precisely as a lawyer's argument, except that it is done upon a more extended—a grander scale. When a company or an individual asks aid from the taxation of a city, town or county, we see clearly enough, that such persons are but interested parties. But when they are able to point us to the practice of the whole country, where the same thing is done almost daily, we do not seem to comprehend, that all this is brought about in the same way, and that it is only the combination of interested parties. Few men, judges any more

than others, like to stand alone in their opinions. We all like to be able to quote authority and precedents, in our support. It requires some firmness and some self-respect to be able to stand alone, even in the best of causes. And to recur to the tenure of judicial office, we have never been able to see very clearly, that the judges of the national courts, all of whom hold office by a permanent tenure, were any more independent of political or personal prejudices and prepossessions, than the state judges, most of whom hold office by popular elections for short terms. Others may see some happy difference in favor of the former. We have hoped there was, and sometimes argued, that there should be, a difference in favor of the independence of the former. But the moment any case occurs, calculated to call up the infirmities already referred to, it has always seemed to us the power to overcome them was more in the character of the man, who was called to deal with such questions, than in the tenure of his office, and that it depended largely upon clear preceptions exactly where the truth lay.

But now that a breach is made upon this question, and two leading state courts have advanced far enough to fix some limit to the definition of "public use," we hope to find the pendulum of judicial opinion vibrating still further in that direction. The difficulty seems, hitherto, to have been to distinguish clearly between a "public use" and one that only remotely contributed to the public good, by increasing the business, wealth or prosperity of a town or city. Public use and public good have been too often regarded as synonymous terms, and consequently it has been maintained by reasonably good lawyers and able judges, that taxation, which it is conceded on all hands, can only be resorted to for public uses, might be made to contribute to the support of all objects which conduced to the public good. Rail-

ways have been largely subsidized by the towns and cities from the public treasury mainly upon this ground. Nobody, at first certainly, seemed to suppose, that it was competent for towns and cities to build entire railways, extending hundreds of miles beyond their limits; but everybody seemed to suppose such towns and cities might contribute to their creation or maintenance, in proportion to the benefit derived from them. But finally, the Supreme Court of Ohio, in *Walker v. City of Cincinnati*, 21 Ohio N. S. 14; s. c. 11 Am. Law Reg. N. S. 346, in spite of a constitutional prohibition against towns and cities "aiding railway companies" in the construction of their roads, deliberately declared, that the defendant was competent, under an act of the legislature, to build an entire railway from Cincinnati to Chatanooga, through portions of three states, at an expense of ten millions of dollars. No doubt a railway, within the limits of a municipality, is a public use for which taxation may be levied, provided the work is owned by the town or city. It has always seemed to us more questionable, how far it was competent for towns and cities to become shareholders in private joint stock companies. The less objectionable mode of contributing aid towards any such work would seem to be, to give the money outright. But the obtaining of shares in the place of the money gives it the semblance of an investment, and thus induces many to vote for aid in this form, looking mainly at the pecuniary venture, who could not be as readily induced to favor an outright gift.

But when the work is extended beyond the limits of the town or city, and beyond the line of the state, there is no argument in favor of contribution, by means of municipal taxation towards its creation or maintenance, which can rest upon any other plausible ground, except that of the public good, in the broad sense of general improvement in wealth

and business, as well as population and other kindred modes of general advancement. And this argument, if we comprehend the matter rightly, applies equally well in favor of both the projects embraced in the cases stated in this note; the one for erecting a saw-mill, box-factory and grist-mill, and the other for advancing twenty millions, for building the city of Boston. And still these projects were, no doubt, justly pronounced merely private enterprises. The proposition seems too obvious to admit of much argument that they are as merely private as any others, conceivable. It is as much a private business in this country, certainly, as any other, to carry on mills. There was a time, when mills for grinding, in England, possessed something of public support, more than was extended to other business. In some places the tenants were bound to have their corn, which embraced all kinds of grain, ground at the lord's mill: *Vin. Ab. tit. Mill*. And the lord might prescribe against any other one building a mill: *Com. Dig. tit. Droit*, H. Bulst. 195. Actions were maintained for not grinding at the mill of the plaintiff, according to custom: *Coryton v. Lithebye*, 2 Saund. 112; *Cort v. Birkbeck*, 1 Doug. 208; *Rex v. Burdett*, 1 Id. Ray. 148. And at one time, by statutes, called the Mill Acts, the Hundred was made responsible for any damage done by the mob to mills, or to the machinery: *Rushforth v. Beatson*, 1 Price 343; s. c. 3 Price 48; s. c. 7 Taunt. 45. Markets and fairs, too, were in England, and are here also held to be a kind of public institution. We are not aware that mills here have any public character, more than tanning or any other business. But we apprehend that the Mill Acts in this country, and the decisions of the courts in some states, have given countenance to the belief, that water-mills were a sort of public use, where the legislature might interfere and control them on public

grounds, different from those applicable to other property. This has resulted, no doubt, from the courts attempting to vindicate the constitutionality of Mill Acts on the ground of "taking private property for public use," by right of eminent domain, as it is called. This view has been maintained, very extensively, in the more recent decisions upon this question, by very able courts and eminent judges. This is the ground upon which the Connecticut cases are placed: *Olmstead v. Camp*, 33 Conn. 532; *Todd v. Austin*, 8 Am. Law Reg. N. S. 9. The same is true in New Hampshire: *Great Falls Man. Co. v. Fernald*, 47 N. H. 444; *Ash v. Cummings*, 50 Id. 591. So, also, in some of the later cases in Massachusetts: *Hazen v. Essex Co.*, 12 Cush. 475; *Talbot v. Hudson*, 16 Gray 417. There are many other cases in the same direction, probably; and on the other hand some of the states have repudiated these mill laws, on the ground that, being only a private use, it will not justify the exercise of the right of eminent domain: *Fisher v. Horicon Co.*, 10 Wisc. 351; *Curtis v. Whipple*, 24 Id. 350; *Moore v. Wright*, 34 Alab. 311, and a case in Vermont not yet reported. There may be others. We should be surprised if they did not very soon outnumber and override those in favor of these acts, unless there can be found some more satisfactory ground upon which to place their constitutionality. If the right of eminent domain exists in favor of mills, it must be upon the mere ground of their public utility. This being admitted, it will seem to some rather difficult to distinguish the principal case, so that it will not fall into the same category of public utility and thus justify taxation. But we consider the argument of the learned Chief Justice most overwhelming and unanswerable in favor of a mill or manufactory, owned and operated by a private company, or natural persons, for their own emolument, be-

ing regarded as a strictly private use for which neither the right of taxation or of eminent domain can be lawfully exercised. We must, therefore, seek some other ground to justify the Mill Acts, or they will be overturned by the principles upon which this case rests. And it has always seemed to us that the ground upon which the Mill Acts were placed by Chief Justice SHAW, in *Fiske v. Framingham Man. Co.*, 12 Pick. 68, was far more satisfactory than that of eminent domain. "We think," says the learned judge, "they will be found to rest for their justification, partly upon the interest which the community at large has in the use and employment of mills, and partly upon the nature of the property, which is often so situated that it could not be beneficially used without the aid of this power." This cannot surely refer to the sovereign right of eminent domain, which, when it exists, is absolute and uncontrollable, and needs no supplementing from "the nature of the property," or any other source. Sovereign power disclaims all aid, and, where it exists, requires none. It is a correlative of some public duty, like that of furnishing highways for intercommunication, the administration of public justice, both civil and criminal; the making of laws and their execution; public education; the administration of the police and of punishment under the criminal laws; the public health; supplying towns and cities with pure water; the postal service and the public defence; and some others of like nature. These are all public uses, for which taxation may be lawfully imposed, and the right of eminent domain exercised by that department of the government, state or national, upon which the public duty rests. Hence nothing can fairly be regarded as a "public use," unless it be a state use, or a national use, in furtherance of a state or national duty. The same eminent judge last quoted said, in

Murdock v. Stickney, 8 Cush. 113, "The principle upon which the Mill Act is founded is not, as has sometimes been supposed, the right of eminent domain, the sovereign right of taking private property for public use." The right of eminent domain is not called into service in the accomplishment of all public duties which have to be carried forward by taxation. There must be some exigency requiring the exercise of the right of eminent domain, in order to justify it. Hence the building of school-houses, court-houses, jails, penitentiaries and hospitals do not ordinarily require its exercise, since the proper sites may commonly be obtained without such exercise. But whenever it becomes necessary to resort to its exercise, in order to obtain the proper site for a school-house, this right may be invoked: *Williams v. School District*, 33 Vt. 278; *Hooper v. Bridgewater*, 102 Mass. 512. And the same will, no doubt, hold true in regard to the site of other public buildings.

But the right of eminent domain can never be exercised for any merely private purpose, however much the public utility or convenience may be subserved thereby. The owner of one rood of land may stand in the way of any private enterprise, however much the general utility may be thereby hindered, and no human power, in a free country, where the principles of *Magna Charta* prevail in their full force, can compel him to budge one step. So, too, all the private wealth of a town or city may ignobly shut itself up and absolutely refuse to advance one cent for the encouragement of manufactures, the arts, commerce or navigation, and thus greatly hinder the growth of such town or city, and no earthly power can compel the proprietors of such wealth to give one cent for the advancement of those enterprises, which the majority may deem matters of the greatest public concern. We say so now, since these

decisions seem to justify such a declaration. We know it will cut off one very convenient form of *compelling public spirit*. But what the country loses in that way it will more than gain compensation for in the quiet security of person and property thereby obtained.

We scarcely need to resort to the definition of public use as opposed to private use. But the terms "public use" are, no doubt, used in the American constitutions, both state and national, in their original and natural sense, as defined by the lexicographers. Thus Johnson defines *public*, as "belonging to a state or nation," and Webster expresses it, as "pertaining to a state, nation or community." Thus we all understand public property, as that which belongs to the state or nation, in opposition to private property, which embraces that which belongs to private persons, natural or artificial. Thus public law means the law pertaining to nations, and private law that which pertains to private persons, and public way means one open to the use of all, and private way, one owned by private persons. And by the same rule a "public use" must import what is for the use of the state or nation or all its inhabitants, as opposed to private use, which is confined to particular persons, natural or corporate. And the right of eminent domain or of taxation, it is conceded on all hands, can only be exercised for some "public use." And by public use is here meant, as we have already shown, some use which belongs to the state or nation, or to those upon whom the state or nation have devolved this public use as a town, county or city; or, in the case of railways and canals, a corporation created for the express purpose of carrying the public use or public duty into effect. Thus it will appear that the right of eminent domain can never be exercised except by the state, for the accomplishment of the performance of its own duties, or else by those upon whom

public duties have been expressly devolved by the legislature. And in neither case can this right be exercised except when there is a necessity for its exercise, or as expressed in the constitution of the state of Maine, "nor unless the public exigencies require it." The same limitation undoubtedly will be found in the constitutions of other states. And even where not so expressed it is always implied, that private property is not to be taken in any case except from necessity, or some public exigency demanding it.

But nothing of this kind can fairly be said to apply to mills of any kind. They are no more public institutions than any other kind of business. The very persons who justify the exercise of eminent domain by the state in their behalf, on the ground that it is for a public use, would scarcely justify the building of mills by taxation, and then allowing them to be operated by private persons for their own benefit; still less would they justify the state in allowing towns and cities to build and operate mills at the public expense. And yet it seems now to be conceded, that the public use to justify taxation must be the same, in principle at least, although not always the same in the particular instance, as that public use which will justify the exercise of the right of eminent domain: *Covington v. Southgate*, 15 B. Monroe 491; *Garrard County Court v. Kentucky Nav. Co.*, 10 Am. Law Reg. N. S. 151; *Opinion of the Judges*, 58 Me. 590.

We must then seek for the justification of these Mill Acts from some other source. And this will be found, if at all, in the nature of the property in water-power or mill privileges. It is, in some sense, peculiar and in others quite analogous to that of property owned in joint tenancy, or as tenants in common. One may own the land upon one side of the stream, and another may own the opposite side. One may not desire to improve his water-power, and may refuse to sell

or lease to the other. Unless, therefore, the legislature may pass laws, enabling the owner upon one side of the stream to rest his dam upon the land of the opposite owner, he cannot enjoy the use of his own estate for its most important advantages. And as the owners of the opposite sides of a stream are regarded, in the nature of tenants in common of the use of the water, there is no more wrong or hardship in compelling one tenant of the use to surrender his interest to the other, than in any statute, compelling a severance of the estates of tenants in common, in lands or tene-ments, by assigning all to one, or making a public sale of the property, which are but the ordinary provisions of such statutes, found in all or nearly all the states. And again, most water-powers require both a head and fall in order to create the requisite force. One may own the fall, and have no title to the land indispensable to make the proper head to render the fall available for any mill purposes. There is, therefore, no more violation of principle in combining these two interests for use, than in combining or separating the estates of tenants in common of the same property for the same end. It has never been questioned that the legislature may regulate the rights or uses of riparian owners upon streams or lakes in its discretion, so as to advance the value of the estate, by defining the mode of occupancy. But this right rests, most unquestionably, upon the nature of the property and the fact, that there must, of necessity, be a kind of joint use, that of one riparian owner affecting all below him. And the same will be found true in regard to all property, where the manner of use affects other property owners or the public. Thus the legislature may regulate the quality and height of fences between adjoining owners or adjoining the highways, but no one will claim that this rests upon any right of eminent domain,

or that the legislature could properly prescribe the mode of fencing land, where only the interest of the owner was concerned. The right to regulate the use of land affecting water-powers must rest, therefore, upon the fact, that all land affected by the exercise of the power is a kind of joint estate, which could not be made available for any profitable use, where each proprietor was allowed to act wholly independent of the other joint owners. Hence there arises an absolute necessity for the interference of the law-making power, to enable the separate owners to combine their estates so as to render the property most useful.

There is another ground upon which these mill laws have been attempted to be justified, viz., that the legislature had the power to prescribe special remedies in all cases where the nature of the property required it. This is done, sometimes, in regard to shade or fruit trees, or glass in buildings, and many other kinds of property specially exposed to damages. And there is no question the legislature may provide more stringent statutory remedies in any special class of cases demanding such provision. And we suppose no lawyer will be prepared to say these special remedies may not be made exclusive of all others. And we see no reason why it may not be equally competent for the legislature to provide special remedies for any act done by way of enlargement of a water-power, and make such remedy exclusive of all others. If so, these Mill Acts may be sufficiently vindicated upon this ground alone. But we should prefer to place their validity upon the two grounds jointly; that from the joint nature of the property there arose a necessity for legislative interference, in order to the full enjoyment of the property, and also to make the remedies thus provided exclusive of all others, in order to prevent confusion by different remedies of a conflicting character. This is not very dif-

ferent from a statute forbidding repeated suits for trespasses by the same party on the same land, of the propriety of which there can be no question, since courts of equity will decree the same on general principles, but a court of law could not enforce the rule without a statutory provision.

We have thus sufficiently shown the impropriety of invoking the reserved rights of the state to apply private property to public use in order to justify the Mill Acts, as they are called; since this is in no sense a public use, and the acts are sufficiently justified upon general grounds of legislative authority. We trust there will not, therefore, be any repugnance felt to the two decisions we are commenting upon, because they leave no ground for the Mill Acts to stand upon.

We hope, too, that we have sufficiently shown that a public use sufficient to justify either taxation or the taking of private property on compensation, must be for the accomplishment of some duty resting primarily upon the state or nation. We shall not further discuss the question, how far the delegation of these public duties to private corporations, such as railway and canal companies, will carry the right to uphold them by taxation. It will, no, doubt, justify the exercise of the right of eminent domain, and hence, we think unjustly, most of

our courts have concluded the right of taxation might be exercised on their behalf. The very fact of committing these public trusts to private companies seems to imply that they are to be carried forward by the money of such companies. No doubt, the state or nation may subsidize such companies. But the attempt to do this by allowing the municipalities to become members of these private companies must surely be an anomaly, and we look for some period to arrive when the courts will so regard it. We look upon these decisions as having removed the principal grounds upon which building railways by taxation has been hitherto justified, viz., that it was applying the money to a public use, which a private railway is not, in the sense of the American constitutions, at least so far as taxation is concerned, which should never be resorted to for upholding a private enterprise.

We need not attempt to add to the argument in the principal case, to show that if "public use" embraces all uses, which conduce to the public good, it will extend to all businesses in the country, since none other could be maintained, and thus throw all private property into the public treasury, to be redistributed at the pleasure of the legislature, a state of things no one will justify, even in argument.

I. F. R,

Supreme Judicial Court of Massachusetts.

BOSTON AND ALBANY RAILROAD COMPANY v. SHANLY ET AL.
CARNEY v. SAME.

An action may be maintained by a common carrier against a person knowingly sending by such carrier explosive and dangerous articles, recently discovered and manufactured, not known to the carrier to be such, and without notice of their character, for any damages caused by the explosion thereof from their inherent tendency to explode or improper packing.

But not against a person who merely orders the same to be so sent as a purchaser, although he gives no such notice.

If two persons, without any concert or knowledge of each other's acts, so send